IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.170 OF 1985

Kusumben Kantilal Shah & Anr. ...Plaintiffs

Versus

The Maharashtra State Financial Corpn. ...Defendants

Shri A.G.Damle for the Plaintiffs.

None for the Defendants.

CORAM : ABHAY S.OKA, J.
DATED : OCTOBER 25th, 2007.

ORAL JUDGMENT:

1. The Plaintiffs have filed this suit for recovery of sum of Rs.98,115.78/- by way of compensation for wrongful use of the premises bearing No.C-2 (hereinafter referred to as the suit premises) in the compound of Panalal Silk Mills Pvt Ltd, Bhandup, Mumbai. The Plaintiffs have prayed for passing the decree against the first Defendant with further interest at the rate of 18% per annum.

2. According to the case of the Plaintiffs the original Plaintiffs Panalal Silk Mills Pvt Ltd were owners of the suit property. The first Defendant is a statutory corporation established under the State Financial Corporation Act, 1951. By an Indenture of Lease dated 01st November, 1964 the original Plaintiffs

have demised the suit premises which is a godown in favour of the second Defendant for a period of three years at monthly rent of Rs.2,100/-. The second Defendant by an indenture of mortgage dated 07th January, 1966 purported to mortgage the suit premises in favour of the first Defendant in consideration of grant of certain financial facilities by the first Defendant to the second Defendant. The second Defendant purported to transfer in favour of the first Defendant the plant and machinery in the suit premises together with goodwill of the business of the second Defendant in favour of the first Defendant. It appears that the second Defendant committed defaults in payment of instalments of amounts payable to the first Defendant. Notwithstanding service of notice of demand, the second Defendant failed to pay the amount.

3. According to the case of the Plaintiffs the second Defendant did not pay rent from 01st January, 1970 in respect of the suit premises and therefore, by notice dated 28th December, 1971 the tenancy of the second Defendant was terminated. The original Plaintiffs thereafter filed a suit for eviction against the second Defendant in the Court of Small Causes. A consent decree dated 19th April, 1973 was passed by the Court of Small Causes in the said suit by which the

second Defendant was required to vacate the suit premises by 31st August, 1973. The second Defendant also agreed to pay arrears of compensation in the sum of Rs.47,536/-.

4. According to the case of the original Plaintiffs, out of the agreed amount under the consent decree, the second Defendant paid only a sum of Rs.30,326/- and thereafter committed defaults in payment of instalments. Warrant of possession as well as warrant of attachment was issued in execution of decree passed by the Court of Small Causes. In execution of the said warrants it was found that the main portion of the suit premises was under the lock of the first Defendant and the cabin was in possession of Central Bank of India. Thereafter, the original Plaintiffs filed another suit in the Court of Small Causes for recovery of amount of compensation. In the said suit consent decree was passed on 19th July, 1973.

5. In the meanwhile the first Defendant filed Misc. Petition No.634 of 1975 in this Court by invoking section 31 of the State Financial Corporation Act, 1951. In the said Petition a prayer was made for the sale of right, title or interest of the second Defendant in the suit premises with plant, machinery and other moveables

and for appropriation of the sale proceeds towards the outstanding amount payable to the first Defendant. An order was passed on 29th April, 1976 in the said Petition against the second Defendant.

6. The first Defendant filed a notice before the Court of Small Causes for setting aside the attachment levied by the said Court at the instance of the original Plaintiffs. On the said notice, by a order dated 13th September, 1977, the Court of Small Causes held that it would be for this Court to determine the claim in respect of property under the attachment. The Plaintiffs applied by way of Chamber Summons No.112 of 1979 in the said Misc. Petition praying for a direction against the first Defendant to remove the hypothecated moveables from the suit premises and to handover vacant possession of the suit premises to the original Plaintiffs in this suit. A prayer was also made in the said Chamber Summons for a direction against the first Defendant to pay monthly compensation of Rs.2110.50/- to the original Plaintiffs from 29th April, 1976 till the date of delivery of the possession to the Applicants. The said Chamber Summons was contested by the first Defendant. By an order passed during the pendency of the Chamber Summons, the first Defendant was directed to deposit a sum of Rs.2110.50/- per month as compensation

commencing from 01st March, 1979. This Court directed the Commissioner for Taking Accounts to expedite the sale of the property of the second Defendant.

7. There were bids received in auction for moveables. However, no one offered to purchase the suit premises. After sale of the moveables was completed, the Plaintiffs were placed in possession of the suit premises by the first Defendant.

8. The Chamber Summons in the Misc. Petition taken out by the original Plaintiffs was disposed of by order dated 05th July, 1984 passed by this Court by accepting the case of the Plaintiffs that the first Defendant had no right, title or interest in the suit premises. However, this Court relegated the original Plaintiffs to file appropriate proceedings for compensation/mesne profit.

9. The prayer in this suit is for grant of compensation/mesne profit at the rate of Rs.2110.50/- per month from 01st April, 1976 to the end of November 1979 together with amount of permitted increases at the rate Rs.268.33 paise per month for the aforesaid period. In terms of the order passed during the pendency of the Chamber Summons, a sum of Rs.32,256.12/- was deposited

by the first Defendant in this Court which has been withdrawn by the Plaintiffs. The Plaintiffs have given credit of the said amount to the first Defendant.

10. It must be stated here that the plaint was amended and the original Plaintiffs were substituted by the present Plaintiffs on the basis of a consent decree passed by this Court in terms of an award. By virtue of the said consent decree, the Plaintiffs became entitled to receive/claim compensation in respect of various properties including the suit properties and were entitled to continue all of the proceedings earlier commenced in the name of M/s.Panalal Silk Mills Pvt Ltd.

11. The first Defendant filed written statement raising various contentions. One of the contention raised by the first Defendant is that the said Defendant was not aware of the order passed by this Court on 05th July, 1984 in the Chamber Summons taken out by the Plaintiffs and they came to know for the first time about the said order only when a copy of the present suit was served to the first Defendant. It is contended that the first Defendant has never instructed their advocate to instruct a counsel and to give consent for withdrawal of the amount deposited of the first Defendant on the basis of the order dated 16th March,

1979. The first Defendant denied that the possession of the first Defendant was illegal or unlawful.

12. Issues were settled on 23rd July, 2007 which read thus:

(1) Whether the Plaintiffs prove that the Defendant No.1 is liable to pay to the Plaintiff Rs.98,115.78 as and by way of mesne profit/compensation for wrongful use and possession of the suit premises?

(2) Whether the Plaintiffs are entitled for interest on compensation of Rs.98,115.78 and if yes, at what rate?

(3) Whether the Plaintiffs prove that the Defendants were in wrongful possession and use of premises from 07th December, 1974 to 17th December, 1979?

(4) What orders and relief?

13. The Plaintiffs examined their constituted attorney Haresh V. Mehta by filing his affidavit in lieu of examination-in-chief. The evidence of the said witness was recorded in this Court on 11th October,

2007. As none appeared for the Defendants, the cross-examination of the said witness was treated as closed. The suit was set down on 24th October, 2007 for recording of evidence of the witness, if any, of the Defendants and/or for arguments. On 24th October, 2007 none appeared for the Defendants. Therefore, evidence of the Defendants was closed and arguments of the counsel appearing for the Plaintiffs were heard and today the suit is kept for dictation of judgment. When the suit is called out today, none appears for the Defendants.

14. I have heard the submissions of the learned counsel appearing for the Plaintiffs. I have perused the affidavit in lieu of examination-in-chief of the constituted attorney of the Plaintiffs. The power of attorney executed by the Plaintiffs in favour of the said witness has been duly proved.

15. It will be necessary to refer to order dated 05th July, 1984 passed by the learned single Judge of this Court in Chamber Summons No.112 of 1979 in Misc. Petition No.634 of 1975. Though the first Defendant in its written statement has pleaded that the first Defendant was not aware of the said order, it is not disputed that the said order was passed by this Court

which relates to the suit premises. There is nothing on record to show that the said order was subjected to any challenge by the first Defendant. Therefore, this Court will have to proceed on the footing that the said order passed by this Court has attained finality.

16. Perusal of the said order shows that this Court has referred to the consent decrees passed by the Court of Small Causes and the fact that on 07th December, 1974 the original Plaintiffs who were Applicants in the Chamber Summons secured symbolic possession of the suit premises. This Court held that the possession of the first Defendant of the suit premises from 07th December, 1974 was clearly illegal and unlawful. It will be necessary to refer to paragraph Nos.4 and 5 of order passed by this Court in the Chamber Summons which reads thus:

> "4. The applicants in these circumstances have taken out the present Chamber Summons on February 22, 1979 and the two reliefs sought are that the petitioners be directed to hand over vacant possession of the godown premises to the applicants and the petitioners be directed to pay the monthly compensation at Rs.2110.50 for use of the godown. As regards

the first prayer, the possession has already been secured by the applicants in December 1979 from the petitioners and therefore that relief is not required to be granted. Shri Tulzapurkar submitted that the petitioners are liable to pay the compensation should be passed in the present proceedings. It is not possible to accept his submission. **Though it is obvious that the occupation of the petitioners of the premises from December 07, 1974 onwards was clearly illegal and unlawful and the petitioners were holding the possession merely as trespassers. It is not possible to determine the mesne profits in the present proceedings**. The applicants are undoubtedly entitled to secure mesne profits from the petitioners for the wrongful occupation but the remedy of the applicants is to file a suit claiming mesne profits and it is not possible to either grant it or ascertain in the present proceedings. Shri Tulzapurkar submitted that the petitioners should not drive the applicants to file a suit and waste more money and enter into litigation. I inquired from Shri Subramanium as to whether the Corporation is willing to pay some reasonable amount to the

applicants for their wrongful occupation of the premises, but Shri Subramanium stated that inspite of the efforts there is no response from the corporation. It is unfortunate that the attitude of the corporation would lead to further litigation and the corporation would incur unnecessary expenses. it is unfortunate that the applicants cannot be granted any relief in this Chamber Summons and the Chamber Summons has to be dismissed.

5. Shri Tulzapurkar stated that by an order dated March 16, 1979 passed by this Court, the petitioners were directed to deposit certain amount in this court from time to time and the said amount should be made available to the applicants. **Shri Subramanium consents to the applicants taking this amount in part satisfaction of the claim for damages which the applicants are entitled to claim"**. (Emphasis supplied)

17. Thus, what has been categorically held by this Court is that:

(i) the possession of the first Defendant of the

suit premises from 07th December, 1974 till December 1979 was illegal and unlawful and the first Defendant was merely a trespasser;

(ii) the original Plaintiffs are entitled to secure mesne profit from the first Defendant for wrongful occupation;

(iii) the remedy of the original Plaintiffs was to file a suit for claiming compensation and quantification of compensation could not be made in the Chamber Summons;

18. In this suit the Plaintiffs have prayed for compensation from April 1976 to November 1979 together with permitted increases at the rate of Rs.268.35/- per month from April 1976 to November, 1979.

19. There is no dispute about the fact that the suit premises were let out at the monthly rent of Rs.2110.50/- per month. Infact, during the pendency of the Chamber Summons in the Misc Petition taken out by the Plaintiffs this Court directed the first Defendant to deposit the compensation amount at the said rate. There is no challenge to the evidence of the constituted attorney of the Plaintiff in which he has stated that

from April 1976 to November 1979 the original Plaintiffs were required to pay permitted increases on account of increase in municipal taxes, cess etc at the rate of Rs.268.35/- per month. As stated earlier while calculating the suit claim, the original Plaintiffs have given a credit in respect of sum of Rs.32,256.12/- which was withdrawn by the original Plaintiffs. The said amount was deposited by the first Defendant in the Chamber Summons as per the order passed by this Court. The Plaintiffs have therefore, established their entitlement for recovery of the compensation as well as permitted increases.

20. The Plaintiffs have claimed interest on the said amount at the rate of Rs.6% per annum from December 1979 till date of institution of the suit and further interest has been prayed for at the rate of Rs.18% per annum. Considering the facts and circumstances of the case further interest will have to be fixed at the rate of Rs.6% per annum. Hence, the issues framed will have to be answered accordingly.

21. As per the Statement of Claim annexed to the affidavit of evidence of the constituted attorney of the Plaintiffs, the total claim of the Plaintiffs till the date of institution of the suit including the interest

at the rate of Rs.6% per annum from December 1979 is Rs.98,115.79/-. Further interest will be payable on the sum of Rs.72,413.23/-.

22. Hence, I pass the following order:

(i) The first Defendant is ordered and decreed to pay to the Plaintiffs a sum of Rs.98,115.79/- together with interest on the sum of Rs.72,413.23/- at the rate of Rs.6% per annum from the date of institution of the suit till realisation or payment.

(ii) The Plaintiffs will be entitled to recover proportionate costs of the suit from the first Defendant.

(iii) Certified copy is expedited.

JUDGE